90 7 C 1867

March 9 1868
Thomas - 2 pm

Brent - submits points
for argument

SUPREME COURT OF THE UNITED STATES.

No. ~~355.~~ ~~247~~ 90

CHARLES R. WATERS, PLAINTIFF IN ERROR,

vs. Brightwell 89

JOHN J. BARRILL AND J. MANUEL MUR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED JANUARY 2, 1866.

GOVERNMENT PRINTING OFFICE.

~~reverse~~ with 10 per cent damages

SUPREME COURT OF THE UNITED STATES.

No. 355.

CHARLES R. WATERS, PLAINTIFF IN ERROR,

vs.

JOHN J. BARRILL AND J. MANUEL MUR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Writ	2	1
Declaration	3	1
Marshal's return	6	3
Demand for bill of particulars	7	4
Bill of particulars	8	4
Plea	9	5
Jury	10	5
Verdict	10	5
Judgment	10	5
Prayer No. 2	11	6
Court's instruction	11	6
Writ of error	13	6
Bond	15	7
Citation	17	8

1 THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday in November (being the 5th day of the same month,) in the year of our Lord one thousand eight hundred and sixty.

Present, the honorable William F. Giles, judge of Maryland district; Wm. Meade Addison, esquire, attorney; John W. Watkins, esquire, marshal; Thomas Spicer, clerk.

Among other were the following proceedings, to wit:

JOHN J. BARRIL and J. MANUEL MUR
vs.
CHARLES R. WATERS.

Be it remembered that heretofore, to wit, on the 13th day of December, in the year of our Lord one thousand eight hundred and fifty-nine, the said John J. Barril and J. Manuel Mur, by S. Teackle Wallis and John H. Thomas, esquires, their attorneys, prosecuted and sued forth out of the circuit court here the writ of the United States of America of summons, directed to the marshal of the Maryland district aforesaid, in the words and of the tenor following, to wit:

Writ.

2 THE UNITED STATES OF AMERICA, *District of Maryland, to wit:*

To the marshal for the Maryland district, greeting:

We command you that you summon Charles R. Waters, a citizen of the State of Maryland, that, all excuses and delays set aside, he be and appear before the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, to be held at the U. S. court-room in the city of Baltimore, on the first Monday in April next, to answer unto John J. Barril, an alien, a subject of her Catholic Majesty the Queen of Spain, and Jose Manuel Mur, an alien, a citizen of the Republic of Peru, partners trading under the name and firm of Barril & Mur, in a plea of trespass upon the case, &c. Hereof you are not to fail at your peril, and have you then and there this writ. Witness the honorable R. B. Taney, chief justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and fifty-nine.

Issued 13 Dec'r, 1859.

[SEAL.] THOS. SPICER, *Cl'k Circ't C't.*

W. & T.

And the said John J. Barril and J. Manuel Mur, by their attorne ys aforesaid, on the day of prosecuting and suing forth of the aforegoing writ, declared against the said Charles R. Waters, in the plea aforesaid, in form following, to wit:

3 Circuit court of the United States in and for the fourth circuit.

DISTRICT OF MARYLAND, *to wit:*

Charles R. Waters, a citizen of the State of Maryland, was attached to answer unto John J. Barril, an alien, and subject of her

Catholic Majesty the Queen of Spain, and Jose Manuel Mur, an alien and citizen of the Republic of Peru, partners trading under the name and firm of Barril & Mur, in a plea of trespass upon the case, &c.

And thereupon the said plaintiffs in this action, by Wallis and Thomas, their attorneys, complain for that, whereas the said defendant in this action, on the first day of October, in the year of our Lord eighteen hundred and fifty-nine, to wit, at the district aforesaid, was indebted to the said plaintiffs in a large sum of money, to wit, the sum of twenty-five thousand dollars, lawful money, for the work and labor, care, diligence and attendance of the said plaintiffs before that time done, performed, and bestowed by the said plaintiff in and about the business of the said defendant, for him, and at his special instance and request, and for divers materials and other necessary things made, done, furnished, used, and applied on and about that work, labor, and business for the said defendant, and at his like special instance and request; and also in another like sum of money for the use and occupation of certain rooms and apartments in and parcels of a certain dwelling-house, buildings, and land, with the
4 appurtenances of the said plaintiffs, by the said defendant, and at his special instance and request, and by the sufferance and permission of said plaintiffs, for a long time then elapsed, had held, used, occupied, possessed, and enjoyed; and also in another like sum of money, for sundry matters, properly chargeable in accounts, as by the particular account thereof, herewith into court brought, may and doth more fully and at large appear; and also in another like sum of money, for divers goods, wares, and merchandise, by the said plaintiffs before that time sold and answered to the said defendant, and at his like special instance and request; and also in another like sum of money, for money by the plaintiffs before that time lent and advanced to, and paid, laid out, and expended for the said defendant, and at his special instance and request; and also in another like sum of money, for so much other money by the said defendant before that time had and received to and for the use of the said plaintiffs; and being so indebted, the said defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said several sums of money in this count mentioned, when the said defendant should be thereunto requested. And whereas, also, the said defendant afterwards, to wit, on the day and year aforesaid, at the district aforesaid, accounted with the said plaintiffs of and concerning divers
5 other sums of money, before that time due and owing from the said defendant to the said plaintiffs, and then in arrear and unpaid; and upon such accounting, the said defendant was then and there found to be in arrear and indebted to the said plaintiffs in another large sum of money, to wit, in the further sum of twenty-five thousand dollars, of like lawful money, and being so found to be in arrear and indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook and faithfully promised the said plaintiffs to pay

them the last-mentioned sum of money, when the said defendant should be thereto afterwards requested:

Nevertheless, the said defendant, not regarding his said promises and undertakings, has not yet paid the aforesaid several sums of money, or either of them, or any part of either of them, to said plaintiffs (although so to do the said defendant was requested by the said plaintiffs afterwards, to wit, on the day and year last aforesaid, and afterwards, at the district aforesaid,) but to pay the same the said defendant has hitherto altogether refused and doth still refuse so to do, to the damage of the said plaintiffs fifty thousand dollars, and therefore they bring suit, &c.

WALLIS & THOMAS,
Plaintiffs' Attorneys.

To the defendant named in the within declaration:

Take notice, that on the day of your appearance to this ac-
6 tion, in the circuit court of the United States, a rule will be entered requiring you to plead to the said declaration, within fifteen days thereafter:

WALLIS & THOMAS,
Plaintiffs' Attorneys.

A copy of which said declaration was made and sent with the said writ to the marshal of the Maryland district aforesaid, thereon indorsed, "Case copy nar. within to be served on defendant."

At which mentioned first Monday in April, in the year of our Lord 1860, being the day of the return of the aforegoing writ, came into the said circuit court here, the said John J. Barril and J. Manuel Mur, by their attorneys aforesaid, and the marshal of the Maryland district aforesaid, to wit, John W. Watkins, gentleman, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here, thus indorsed, to wit:

Cepi. JOHN W. WATKINS, *U. S. Marshal.*

And the said Charles R. Waters, being called, appears in court here by Robert J. Brent, esquire, his attorney.

And thereupon, on motion of the said John J. Barril and J. Manuel Mur, by their attorneys aforesaid, it is ruled by the court here, that the said Charles R. Waters answer to the declaration aforesaid of the said John J. Barril and J. Manuel Mur in the plea aforesaid, or judgment by the court here will be rendered against him in default thereof.

7 And the said Charles R. Waters, by his attorney aforesaid, filed in court here a demand for bill of particulars of plaintiff claim, in the words following, to wit:

In U. S. circuit court.

BARRIL and *al.*
vs.
C. R. WATERS.

MR. SPICER: Enter rule for bill of particulars in the above case.

R. J. BRENT, *For Def't.*

April 9, 1860.

Service acknowledged this 9th April, 1860.

WALLIS & THOMAS, *For Pl'ffs.*

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, and their attorneys aforesaid, and by order of the court here thereon, is continued until the first Monday in November next.

At which first Monday in November, in the year of our Lord 1860, comes again into the circuit court here, the parties aforesaid, by their attorneys aforesaid.

And thereupon the said John J. Barril and J. Manuel Mur, by their attorneys aforesaid, filed in the circuit court here a bill of particulars of the plaintiff's claim, which is in form following, to wit:

8 Charles R. Waters in acc't with Barril & Mur.

Dr.

1859.					
Aug. 19.	To	guano	pr. O.	394	$2,999 46
Aug. 20.	To	Do.	" "	390	2,999 22
Aug. 23.	To	Do.	" "	395	2,998 96
Aug. 25.	To	Do.	" "	397	2,999 98
Aug. 30.	To	Do.	" "	396	2,997 00
Sept. 1.	To	Do.	" "	391	2,995 88
Sept. 3.	To	Do.	" "	398	2,998 79
Sept. 6.	To	Do.	" "	399	2,998 12
Sept. 9.	To	Do.	" "	459	2,998 26
Sept. 12.	To	Do.	" "	460	3,000 00
Sept. 14.	To	Do.	" "	389, 477, and 478	11,992 82
Sept. 16.	To	Do.	" "	479	2,888 06
Sept. 19.	To	Do.	" "	488 and 481	5,998 34
Sept. 21.	To	Do.	" "	482	3,000 00
Sept. 22.	To	Do.	" "	483	2,999 17
Sept. 24.	To	Do.	" "	484, 485, and 486	8,999 04
					65,975 10
Less 1 per cent.					659 75
					65,315 35
Interest from 10 Sept., average time					762 01
					67,077 36

1859.		Cr.	
Aug. 23.	By cash paid this day	$5,998	68
Aug. 27.	By cash paid this day	3,000	00
Sept. 2.	By cash paid this day	2,878	97
Sept. 7.	By cash paid this day	6,000	00
Sept. 13.	By cash paid this day	6,000	00
9 Sept. 16.	By cash paid this day	5,809	16
Sept. 20.	By cash paid this day	8,903	08
Sept. 23.	By cash paid this day	9,098	34
	By balance	21,389	13
		66,077	36
Nov. 19.	To balance	21,389	13

E. & O. E.
Baltimore, 19 November, 1859.

Which said bill of particulars is thus indorsed, to wit:
Service of copy admitted, October 17, 1860.

R. J. BRENT.

And the said Charles R. Waters, by his attorney aforesaid, defends the force and injury when, and so forth, and says that he did not undertake or promise in manner and form as the said plaintiffs have above complained against him, and of this he puts himself upon the country.

And the said plaintiff doth the like.

Whereupon, for trying the issue aforesaid, it is ordered by the court here, that twenty persons from the panel of petit jurors, returned to the court here by the marshal of the Maryland district aforesaid, be drawn by ballot; and thereupon the twenty persons being so drawn by ballot and written upon two lists, one of
10 which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists, thereupon the remaining twelve persons being called, come, to wit:

Charles W. Binney, Robert M. Walmsley, Richard Hugg, Thomas Hope, Samuel R. Kirby, Joseph S. Henisler, Johnson Benson, Adi Pindel, Wm. Dwyer, Samuel B. Freeman, John L. Thomas, Wesley Disney, who, being impanelled and sworn to say the truth in the premises, upon their oath do say that the said Charles R. Waters did undertake and promise in manner and form as the said John J. Barril and J. Manuel Mur have above against him complained, and they assess the damages of the said plaintiff, by reason of the non-performance of the said promise and undertaking, to the sum of twenty-one thousand three hundred and eighty-nine dollars and thirteen cents.

Therefore it is considered by the court here, that the said John J. Barril and J. Manuel Mur recover against the said Charles R. Waters,

as well the sum of fifty thousand dollars, the damages in the declaration of the said John J. Barril and J. Manuel Mur mentioned, as the sum of forty-eight dollars and five cents, adjudged by the court unto the said John J. Barrel and J. Manuel Mur, on their assent, for their costs and charges by them about their suit in this behalf expended. And the said Charles R. Waters in mercy, &c.

11 The following prayer was filed court here, to wit:

Prayer No. 2, *(granted.)*

If the jury believe from the evidence aforesaid that the orders offered in evidence, and not purporting to be indorsed by the defendant, were drawn by the plaintiffs on A. E———, as the agent of the plaintiffs, then the possession of said orders by the plaintiffs unindorsed by the def't is no evidence of itself to charge the def't with the delivery of the guano therein named.

And the following instruction of the court was filed in court here, to wit:

If the jury shall find from the evidence that the guano, to recover the value of which this suit was instituted, was, before this suit was brought, sold and delivered by the plaintiffs to the defendants, then the plaintiffs are entitled to recover.

And now here at this day, to wit, on the first day of March, in the year of our Lord 1865, the said Charles R. Waters produced to the said circuit court here, the writ of United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid, of the judgment aforesaid, so
12 as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on first Monday in December next, which said writ of error is in the words and of the tenor following, to wit:

13 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the judges of the circuit court of the United States for the fourth circuit, in and for the Maryland district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or some of you, between John J. Barril and I. Manuel Mur, plaintiffs, and Charles R. Waters, defendant, a manifest error hath happened, to the great damage of the said Charles R. Waters, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, that, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this

writ, so that you have the same at Washington on the first Monday in December next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the honorable S. P. Chase, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-four.

14 Issued 1st March, 1865.

[SEAL.] JAMES W. CHEW, *Clerk Circuit Court.*

15 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby tranrmitted to the said Supreme Court accordingly.

Appeal bond.

Know all men by these presents that we, Charles R. Waters and Robert J. Brent, are held and firmly bound unto Barril and Mur in the full and just sum of two hundred dollars, lawful money of the United States, to be paid to the said Barril and Mur, their certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made and done we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 30th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas at the circuit court of the United States for the fourth circuit and district of Maryland, begun and held at the city of Baltimore, on the first Monday in November, in the year of our Lord one thousand eight hundred and sixty- , the said Barril and Mur recovered their judgment against the said Charles R. Waters for their costs and charges by them about their defence in that behalf laid out and expended; and whereas the said

16 Charles R. Waters hath sued out the writ of the United States of America for the correcting of errors, and a citation directed to the said Barril and Mur, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at the city of Washington on the first Monday in December then next, to show cause, if any there be, why the judgment aforesaid, so as aforesaid rendered as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties aforesaid in this behalf:

Now, the condition of the aforegoing obligation is such that if the said Charles R. Waters shall well and truly prosecute with effect his said writ of error, and, pay unto the said Barril and

Mur, their heirs, executors, adminstrators, and assigns, their costs, and charges aforesaid, adjudged unto him by the said circuit court, and also all such damages, costs, and charges as may be awarded unto him by the said Supreme Court, in case he, the said Charles R. Waters, shall fail to make good his said plea, then the above obligation to be void and of none effect; otherwise, to be and remain in full force and virtue in law.

ROBERT J. BRENT. [SEAL.]

Signed, sealed, and delivered in the presence of—
WILLIAM F. GILES.

Bond approved 30 Nov., 1865.

WILLIAM F. GILES.

17 The United States of America to John J. Barril and J. Manuel Mur, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, wherein Charles R. Waters is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Charles R. Waters, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal this 30th day of November, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] WILLIAM F. GILES.

1st DEC'R, 1865.

18 I acknowledge notice of the above citation.

W. JOHN H. THOMAS,
Att'y for J. J. Barril.

J. Manuel Mur has been for some time deceased.

19 In testimony that the aforegoing is a true copy, taken from the records and proceedings of the circuit court aforesaid, I hereunto subscribe my name, and affix the seal of the said circuit court, this thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five.

[SEAL.] JAMES W. CHEW, *Clerk Circuit Court.*

WATERS vs. BARRILL.

MOTION TO DISMISS.

Notes of Counsel for Plaintiff in Error.

on the first March 1865.

1st Point. The writ of error being properly issued, this Court has jurisdiction. The citation is only to bring the party into Court, and the time of its service, and any irregularity in this respect, will only entitle the Defendant in error to a continuance at the first term.

It is true that the 22d section of the Judiciary Act requires twenty days notice to the adverse party, but by a continuance of the case he obtains more than twelve months notice. The citation may be waived by a general appearance of the Defendant in Error.

Buckingham vs. McLean, 13 How., 162.

Even the acceptance of service of the citation, without exception by the counsel, is a waiver of the want of due service.

Peale vs. Phipps, 8 How., 256.

It is enough if served before the term.

Wood vs. Lyde, 4 Cranch, 180.
6 How., 90.

But by *the delay* of the Defendant in Error having *actual* notice of the writ of error prior to the return day, and his suffering a whole term to elapse before he objects, it is equivalent to a joinder in error and a waiver of all irregularities.

McDonough vs. ~~Nellender~~, 3 How., 707.

Chillandon

WATERS vs. BARRILL.

MOTION TO DISMISS.

Notes of Counsel for Plaintiff in Error.

on the first March 1865.

1st Point. The writ of error being properly issued, this Court has jurisdiction. The citation is only to bring the party into Court, and the time of its service, and any irregularity in this respect, will only entitle the Defendant in error to a continuance at the first term.

It is true that the 22d section of the Judiciary Act requires twenty days notice to the adverse party, but by a continuance of the case he obtains more than twelve months notice. The citation may be waived by a general appearance of the Defendant in Error.

Buckingham vs. McLean, 13 How., 162.

Even the acceptance of service of the citation, without exception by the counsel, is a waiver of the want of due service.

Peale vs. Phipps, 8 How., 256.

It is enough if served before the term.

Wood vs. Lyde, 4 Cranch, 180.

6 How., 90.

But by *the delay* of the Defendant in Error having *actual* notice of the writ of error prior to the return day, and his suffering a whole term to elapse before he objects, it is equivalent to a joinder in error and a waiver of all irregularities.

McDonough vs. ~~Nullander~~, 3 How., 707.

Phillandon

Especially is it too late when it makes a second writ of error ~~too late.~~ unavailable

Buckingham vs. McLean, 13 How., 162.

Even the failure to give an Appeal Bond may be remedied during the term.

Brobst vs. Brobst, Wallace's Reports 5-6

2d Point. It is enough that we filed the transcript and docketed the case at the *return term* of the Writ of Error, ~~and the Defendant in Error,~~ and the ninth rule invoked by the counsel, cannot aid them, as they neglected to avail themselves of it before we docketted the case.

Steamer Virginia vs. West, 19 How., 183, ~~1, 81, 5, 106.~~

3 Gwin vs Breedlove 15 Pet 284 {6 – 81 {6 – 106

3d Point. The suit was brought by Wallis and Thomas, as counsel for Barrell and Muir, (see narr,) the judgment was in favor of both Plaintiffs, and the citation was to both, and served on Mr. Thomas, one of the Plaintiff's counsel, of record. In acknowledging service, he signed only as attorney for Barrill, stating that *Muir was dead.* We maintain the service was good.

BRIEF OF PLAINTIFF IN ERROR ON THE MERITS,

In case the Motion to dismiss is overruled.

The Circuit Court had no jurisdiction in this cause, and its judgment must be reversed.

The rule is well established, that the pleadings must aver citizenship of Plaintiff and Defendant.

The leading case is that of

Bingham vs. Cabot, 3 Dallas, 382.
And see Turner vs. Emille, 4 Dallas, 7.
Course vs. Stead, 4 Dallas, 22.
Wood vs. Wagner, 2 Cranch, 9.

In Capron vs. Van-Voorden, 2 Cranch, 126, the Plaintiff was allowed to reverse a judgment against him, upon the ground that he had failed in his pleadings to show the citizenship of parties to be such as conferred jurisdiction.

The fair presumption in cases of *limited* jurisdiction, such as that vested in the Circuit Courts, is that a case is without its jurisdiction until the contrary appears.

Turner vs. Bank of North America, 4 Dallas, 8.
Kemp vs. Kennedy, 5 Cranch, 303.

The citizenship must be set forth (meaning by averment.)
Sullivan vs. Fulton Steam Co.. 6 Wheat, 450.
13 Peters, 61.

The citizenship must be averred in pleading.
1 Paine, C. C. R., 594.
3 Cranch, 267.
1 Wheat, 91.

Especially the citizenship of Defendant where alien Plaintiff sues.

2 Peters, 136.

This is necessary in order that the Defendant may plead in abatement, and thus try the question of citizenship in limine.

DeWolf vs. Rabaud, 1 Peters, 498.

In the present case the narr makes no averment whatever of citizenship.

It is true that the narr recites the writ as *describing* the citizenship of the parties, but even if the writ did so describe them, it is no part of the record unless oyer of it is craved, which is not done here.

1 How, 241.
11 Wheat, 280.
2 Wheat, 45.
11 Md. Rep., 347.
60 Law Lib., 39.

In the Kings' bench there never was any recital of the writ.
1 Chit. Plead., 283, ~~vide.~~ side

In Common Pleas the recital is ~~vide~~ only of nature of the action.

1. Ch. Pl., 283.
See fully on this recital 1 Saund. R., 318, N. 3.

Suppose the writ had correctly described the citizenship of parties, it does not dispense with the necessity of averring it in the narr, so that the Defendant may plead in abatement. How can the recital of a supposed writ, not spread on the record, have greater effect than the writ itself?

Even if the citizenship had been stated in the caption of the narr, it would not be sufficient.
See 8 Peters, 148.

If the precedents are examined, it will be found in every case, that in the declaratory part of the narr the citizenship is stated, and not by way of recital of the writ.

Here the whole jurisdiction hinges on the character of the parties, and so material a fact cannot be stated by way of recital of the contents of a writ not spread on record.

1 Chitty Pleadings, 272, ~~vide p note 9.~~ side p note g
1 Chitty, p. 283. vide
1 Saund. R., 318, N. 3.

R. J. BRENT,
For Plaintiff in Error.

It is proper to add in this case that exceptions were reserved on the trial to the rulings of the Court, but by causes not agreed upon in the recollection of Counsel though written out they were never submitted to the Court but have been wholly lost or mislaid and could not be settled between the Counsel or by the Court after the lapse of time.

R. J. Brent

Supreme Court of the U. S.

December Term, 1867.

No. 90.

BARRIL ats. WATERS.

Motion to Dismiss.

BRIEF OF THE DEFENDANT IN ERROR,

JOHN J. BARRIL.

S. T. WALLIS,
JOHN H. THOMAS,
Attorneys of John J. Barril.

Supreme Court of the United States.

December Term, 1867.

No. 90.

BARRIL *ats.* WATERS.

Motion to Dismiss.

BRIEF OF THE DEFENDANT IN ERROR,
JOHN J. BARRIL.

1. As to the citation.

The Writ of Error was returnable to the 1st Monday of December, 1865, being the 4th of the month. The citation was not served until the 1st of December. As a notice of twenty days must be given under the Statute, before the return-day, the record was brought up irregularly and the cause must be dismissed, unless the defect is otherwise cured.

Yeaton *vs.* Lenox, 7 Peters, 220.

It is argued on the part of the Plaintiff in Error that service of the citation was "accepted," without exception, by the counsel of the Defendant and that this amounts to a waiver, under the ruling in Peale vs. Phipps, 8 Howard, 257. But this is a mistake of fact. The record shows (p. 8) that the counsel of Barril below only "acknowledged notice" of the citation. There was no acceptance and no waiver. The case of Peale vs. Phipps was one of misnomer and mistake of parties, and the counsel of the real Defendants in Error having accepted the erroneous

notice without exception, the Court held that they were not misled and could not take advantage of the errror. Here, the acknowledgment of notice had no effect beyond what would have been the result of proof of service *aliunde*.

It is also thought by the Plaintiff's counsel that this case comes within the principle adopted in McDonough vs. Millaudon, 3 Howard, 707, and other cases cited. But, here, there has been no general appearance; no joinder in error, actual or constructive; no *certiorari* prayed; nothing upon which to found a presumption of waiver, or a reason for presuming it, as in those cases. The Defendant, it is true, did not appear until this term, but he then appeared merely to file, and in filing, this motion, and none of the cases determine that the isolated fact of delay is equivalent to waiver. There must be something besides delay. In Buckingham vs. McLean, 13 Howard, 151, the ground on which delay is taken as an element in the presumption of waiver is, that the Plaintiff may thereby be put off his guard, and may let the time pass within which he otherwise might renew his Writ of Error. But in this case the Plaintiff in Error could not be damaged by delay. His record did not come into this Court till January 2d, 1866. The judgment below was rendered to November Term of the Circuit Court for 1860, more than five years before such return. He is therefore in no worse position now than if this motion had been filed on the day the return was made, his right to sue out another Writ of Error having been then at an end as effectually as now.

2. The second ground for the motion is abandoned under the recent decision of the Court in Sparrow vs. Strong, 3 Wallace, 97.

3. As to the non-service of the citation on Mur.

All the service was on Mr. Thomas, who was of counsel for the Plaintiff below. The Plaintiff in Error requested Mr. Thomas to acknowledge notice, instead of leaving it to be proven *aliunde*. He did so, as counsel for Barril only, giving as his reason for declining to do so as counsel for Mur, that

the latter had been for some time deceased. It was as clearly his duty to decline to act for a dead man, as it was to represent his surviving client. Then the only proof of service of citation is an acknowledgment of its service on one Defendant in Error, through his counsel, the other Defendant being dead. This is the showing of the Plaintiff in Error. It is the case and record that he brings up and he is bound by it. Clearly it shows no service on any one but Barril and brings no one but him into this Court as Defendant in Error, though the Writ of Error is against both, and the citation is directed to both.

It is no answer, to say that the judgment below survived to Barril, as partner surviving. The Writ of Error and the citation are not so framed, and no proceedings have been taken to shape the record in conformity with the facts. *Non-constat*, indeed, whether Mur died before or after the suing out of the Writ of Error, or whether proceedings on account of his death were proper to be had here or below.

There is no precedent, so far as we have been able to examine, which meets the precise case, nor is it covered by the rules.

S. T. WALLIS,
JOHN H. THOMAS.
Attorneys of John J. Barril.

Supreme Court of the U. S.

December Term, 1868.

No. 90.

BARRIL ats. WATERS.

BRIEF OF DEFENDANT IN ERROR.

S. T. WALLIS,
JOHN H. THOMAS,
Attorneys of John J. Barril.

Supreme Court of the United States.

December Term, 1868.

No. 90.

BARRIL *ats.* WATERS.

BRIEF OF DEFENDANT IN ERROR.

The motion to dismiss in this cause having not been called up, by consent and for convenience of counsel on both sides, they have agreed to file their briefs on the merits, without the Defendant's waiving anything by the appearance of his counsel to do so: his right to a dismissal, if he has any, to rest upon the state of the case as it was when he moved to dismiss.

The only ground of Error assigned by the Plaintiff in Error, in his brief, is that the Court below had no jurisdiction, because the alienage and citizenship on which jurisdiction depended are not sufficiently averred. It is not pretended that the citizenship and alienage are defectively set forth in the declaration, so far as concerns the language used to describe them, but it is insisted that there is no technical "averment" of the same under the rulings of this Court. The description of the parties, it is said, is given in that part of the *narr.* which recites the writ, and is not the subject matter of a specific and subsequent averment. The writ, it is said, is no part of the record unless oyer be prayed, and a recital of the writ can be no better than the writ itself. To such a recital, it is said that no plea in abatement could be pleaded, and hence its insufficiency as an averment.

Now, it is quite true that the writ is no part of the pleadings, without oyer, under the Maryland practice.

Chapman *vs.* Davis, 4 Gill, 178.

But it "is in Court and forms a part of the record." Id. Ib. And the Defendant, if he desires to plead in abatement any matter arising upon the writ, can make it "a part of the pleadings" by demanding oyer, and if he fails to do so, loses his opportunity. Id. Ib. The writ, in this case, is brought up as part of the record; its conformity with the recitals of the *narr.*, as to citizenship and alienage, if it be the subject of inspection here, will be seen to be exact; and that the Court may inspect the writ, when necessary, is clear.

Richardson *vs.* Milburn, 11 Md. 347.

But if the Plaintiff in Error had any question to raise upon the writ by abatement, it is clearly his own fault that he did not crave oyer and raise it below. If by oyer he could have made it part of the pleadings, he has no ground for complaint in the fact that he did not choose to make it such. And if, on oyer, a variance shown to exist between the writ and the declaration sustains an abatement, it seems to follow that the recital of the writ in the declaration, must be, like the rest of the declaration, a part of the pleadings, and the citizenship and alienage set up in such recital cannot be held as otherwise than pleaded, or averred.

But jurisdiction, though required by this Court to be averred, is not placed "*inter apices juris.*" It must appear by express averment or proper legal intendment. And that is all that is required.

Turner *vs.* Bank of N. America, 4 Dallas, 8.
Christ Church *vs.* The County of Philad., 20 Howard, 28.

The facts on which the averment rests are not involved in the general issue. They are the subject of a plea in abatement only,

and if averred so that such a plea may be pleaded to them, they are of course sufficiently pleaded.

In Maryland the writ in fact follows and does not precede the declaration. The latter is filed and the writ is issued upon it and under it. What therefore takes the shape of the recital of the writ, in the *narr.* is the foundation of the writ and not a deduction from it.

Evans' Practice, (1st edit.,) 79 to 81.

It is an averment of the names and character of the parties, to all intents and purposes, no matter if its form be that of a recital. "Any words, which imply such a matter to be so, are sufficient" as an averment.

2 Williams Saunders, 61 g, n. 9.

Nor indeed is the portion of the *narr.* referred to a "recital" of the writ at all. It is merely a statement of "the nature and quality" of the suit and of the names and character of the parties, briefly made, under a rule of the English Courts as old as A. D. 1654.

1 Williams Saunders, 318, n. 3.
1 Tidd's Practice, 433.
Stephen on Pleading, 30.

And such statements are now introduced into the *narr.* not because of any necessity to recite the writ, under the modern doctrine, but because uniform precedent has made it a requisite of the Plaintiff's first pleading, to omit which is error.

Stephen on Pleading, 427, 393.

Here then, in the first pleading in the case, on which the writ is to go, the Plaintiff sets forth that he, an alien, &c., sues the Defendant, a citizen, &c., and thereupon charges that "the said Defendant" is indebted to "the said Plaintiff." If the alienage and citizenship do not thus appear specifically, as well as by

intendment, it would not be easy to make them apparent. No words could more clearly "imply the matter to be so," and, under the 32d section of the Judiciary Act of 1789, it is hard to understand how their sufficiency can be doubted, in any event.

Railroad Co., *vs.* Lindsay, 4 Wallace, 656.

And what impediment was there to a plea in abatement below? Ordinary pleas of the sort, founded on the incompetency of the parties named to sue or be sued, may be and always are pleaded without difficulty, though the only foundation for them is laid in the averment or statement in question, with which the *narr.* commences.

Stephen on Pleading, 478.
1 Chitty on Pleading, 448.

Why not, then, where the incompetency of the parties is equally in issue, as affecting jurisdiction, and is equally to be brought in question by plea in abatement only?

There is no analogy in the case from 8 Peters, 48, for there the statement of citizenship was only in the disconnected caption of the proceedings and not in a pleading.

But the question is put at rest by the leading case of the Covington Drawbridge Co. vs. Shepherd, 20 Howard, pp. 228 and 232, where the only averment giving jurisdiction, by description of the parties, was in the recital or statement of the writ, as here, and it was declared to be not only an averment but a sufficient one.

This mode of making the necessary averments has been recognized as proper by this Court, in every case in which the question, as to the sufficiency of the averments, or the proper mode of making it, has arisen.

Lafayette Ins. Co. v. French, 18 How. 405.
Phil. Wil. & Balto. R. R. Co. v. Quigley, 21 How. 207.
Sheppard v. Graves, 18 How. 508.

S. T. WALLIS,
JNO. H. THOMAS,

The declaration in this case is in the precise form always used in the 4th Circuit, and in the precise form which was approved of by this Court.

See Vol. 1st p. 761 Transcript of Records of 1858 in which is set out at length the Declaration which is approved of in 21 How. 207